UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

EXCEL MARITIME CARRIERS LTD., ET AL., Case No. 13-23060-rdd

Debtors.

- -x

B E F O R E:

HON. ROBERT DRAIN

U.S. BANKRUPTCY JUDGE

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MODIFIED BENCH RULING

I have before me a motion by the official unsecured creditors' committee, which is supported by the trustee for the unsecured debt, for an order terminating the debtors' exclusive periods under Section 1121 of the Bankruptcy Code to file and obtain confirmation of a Chapter 11 plan.

We are well within the debtors' initial exclusive periods under the Bankruptcy Code to file and solicit vote on a plan, and the debtors have filed a Chapter 11 plan and disclosure statement and have a hearing on the adequacy of the disclosure statement scheduled at the end of September.

So the case is clearly moving forward with a plan that is also clearly supported by the debtors' largest creditor body by debt. In other words, the case is moving forward at a pace that for a case of this size is rapid and, as I said, well within the exclusive periods set forth by Congress in the Bankruptcy Code.

So the debtors are not looking to extend their exclusive periods, where they would have the burden to do so

for cause under Section 1121(d). Instead, the committee is looking to terminate the period that the debtors have to obtain acceptances, in order to file its own competing plan and seek to obtain acceptances of that plan.

Under the Code, the committee therefore has the burden to show cause for termination. 11 U.S.C. § 1121(d)(1). "Cause" is not defined in the statute, and most cases with regard to the exclusive periods discuss cause in a slightly different context, that is, cause to extend the exclusive periods rather than to terminate them.

I agree with the few cases that have dealt with this type of situation and conclude that the burden here is a heavy one, that terminating exclusivity -- particularly during the initial exclusivity period is an extraordinary thing in a bankruptcy case. In re Energy Conversion Devices, Inc., 474 B.R. 503, 508 (Bankr. E.D. Mich. 2012); In re Geriatrics Nursing Home, 187 B.R. 128, 132 (D.N.J. 1995); In re Interco, Inc., 137 B.R. 999, 1000 (Bankr. E.D. Mo. 1992).

Usually -- and it's hard to say "usually" because there are not that many published opinions where exclusivity is terminated during the initial exclusive periods -- the periods are terminated because of some conduct by the debtor that is short of conduct that would justify the appointment of a trustee (where the statute provides that the exclusive period

is terminated automatically) but, still, troubling conduct, for example where the debtor appears to be unable to negotiate a plan because of internal conflicts, or is mismanaging the bankruptcy case short of the need to replace management, or is otherwise using exclusivity in a way that Congress didn't contemplate when it gave debtors in possession the exclusive time to propose and obtain confirmation of a plan. In re Texaco, Inc., 81 B.R. 806, 812 (Bankr. S.D.N.Y. 1988). The mere fact that key players want to file a competing plan is not sufficient cause to terminate a debtor's exclusive periods. In re Geriatrics Nursing Home, 187 B.R. 128, 132 (D.N.J. 1995).

The ultimate test is left to considerable discretion by the Court, and it is very fact driven. Id. Both sides have cited Judge Gerber's opinions in the Adelphia case where he detailed several factors that, depending on the particular context, may be relevant -- nine factors -- that is: the size and complexity to the case; the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; the existence of good faith progress toward reorganization; the fact that the debtor is paying its bills as they become due; whether the debtor has demonstrated reasonable prospects for filing a viable plan; whether the debtor has made progress in negotiations with its creditors; the amount of time which has elapsed in the case; whether the debtor is seeking an extension of exclusivity in

order to pressure creditors to submit to the debtor's reorganization demands; and whether an unresolved contingency exists. In re Adelphia Communications Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006), which quotes an earlier opinion in the same case by Judge Gerber that was subsequently affirmed at 342 B.R. 122 (S.D.N.Y. 2006).

Those or similar factors have been cited in other cases, including relatively recently by Judge Glenn in In re Border's Group, Inc., 460 B.R. 818 (Bankr. S.D.N.Y. 2011).

However, Judge Gerber would be the first to note that the context is what is most important, and, as he stated in the Adelphia case, the ultimate consideration for the Court was what will best move the case forward in the best interest of all parties.

And given the unusual facts here that's what I've ultimately focused on. As I think would be clear based on my recitation of where the case stands at this point, most of the factors that I have listed would argue for not terminating exclusivity. The debtors have moved ahead with a plan. They have the support of their largest creditor group on that plan. A disclosure statement will be considered very shortly. And this is not a case where it appears to me that the debtors' plan is a plan that's DOA or one that is obviously not in good faith, which is another way of saying it is not DOA.

On the other hand, it is a plan that at least is premised upon a transaction that involves insiders, through the Ivory Shipping transaction, obtaining a significant amount of equity in either the reorganized debtor under the plan or as a consequence of the plan.

That fact is troubling in the context of a debtor's continuing assertion of exclusivity, first, on the most basic point, in that it's long been held that exclusivity should not be used simply to pressure a creditor to accede to the debtor's point of view on a critical issue. See for example, In re McLean Industries, Inc., 87 B.R. 830, 834 (Bankr. S.D.N.Y., 1987),and, second, perhaps more importantly, because the Supreme Court in Bank of American National Trust and Savings Association v. 203 North LaSalle Street Partnership, 526 U.S. 434 (1999), has made it pretty clear that if a plan is properly viewed as a new value plan and, therefore, confirmable only under the new value exception to the absolute priority rule (which the 203 North LaSalle court neither endorsed nor abrogated) the debtor will not be successful in even getting out of the gate with such a plan if the Court concludes that the insider "purchaser" in essence had an exclusive option to obtain the reorganized equity.

It's clear from the discussion in the 203 North LaSalle case that one way to lift that cloud over such a plan

is to terminate exclusivity, Id. at 454-56.

I have had a few hearings in this case already, some of which have been contested. From the record of those hearings, it appears to me that the debtors engaged in a prolonged period of negotiations with their senior lender group prepetition. It appears to me that those negotiations were difficult. It appears to me that I cannot say today whether the debtors because of the difficulty of those negotiations and their own -- the exigencies of their own financial problems -- were effectively precluded from negotiating with the remaining unsecured creditors during the prepetition period.

In any event, even if the debtors filed this case with the full support of their senior lender group, it was clearly with a plan that was not at all attractive on an objective basis to the unsecured creditor group, unless the unsecured creditor group accepted the valuation assumptions of the plan as well as the structure of the plan.

Therefore, it appears to me that while this case is on a fast track and that track is generally something that courts and Congress approve of, some facts argue for placing a limit on the exclusive periods. Thus, there is some danger here that if I denied the committee's motion, the debtors would simply continue on their present track -- and this is an important fact -- get to confirmation sometime in October or early

November with a contested confirmation hearing and at least the prospect of the Court not approving confirmation, at which time the debtor would have very little cash on hand, and someone would have to pay the bill thereafter to get to a plan that would be confirmed.

The testimony at the prior hearing that I mentioned on cash collateral is that there would be roughly four or five million dollars of cash left in the debtors at that time. So the committee has argued and the indenture trustee has argued that really there is a need at this point to open up the playing field because the alternatives are so bleak that either they will lose a significant amount of the value in the debtors by further delay of opening up their ability to file a plan, or, alternatively, they will be coerced into voting for a plan without any meaningful negotiations. Those factors all argue strongly for terminating exclusivity, notwithstanding the strong arguments that I began with for keeping exclusivity in place.

A couple of facts have come out and been confirmed on the record that are in addition relevant to the resolution of the problem. First, it is clear that the restructuring support agreement with the senior lenders that underpins the debtors' plan, as well as the cash collateral order that is in place, do not prohibit the debtors or the senior lender group from

negotiating a plan and considering plan proposals, including proposals supported by third-party investment or by the committee. The debtors have a clear fiduciary “out,” which has been reaffirmed by their counsel today, and the lenders recognize that “out” and recognize that there's no limitation on their talking and negotiating with third parties regarding alternative plans to the plan on the table. If that had not been the case, I believe the balance would have been tipped to terminating exclusivity so those negotiations could take place. But that's not required.

On the other hand, it is clear that if exclusivity is terminated, that fact in and of itself will not trigger a default under the cash collateral order or the restructuring support agreement, either.

However, it does appear to me to be clear -- and this is based upon my experience reviewing fee applications and both reviewing pre-trial discovery, as well as contested plan confirmation hearings, and, frankly, having done both of those things before I went on the bench, that the cost, the added cost, to the estate of terminating exclusivity and having a prompt filing of an alternative Chapter 11 plan, which I have no doubt would happen (the committee has been very upfront about that) would be large here. As things stand, there will already be a significant cost to litigating confirmation of the

debtors' plan that's on file today. However, I think that cost would increase dramatically if I terminated exclusivity and the parties engaged, as I trust they would, in the pursuit of not one, but two contested Chapter 11 plans.

I have reviewed the committee's proposed backstop agreement and the exhibits to it, including the plan summary, and heard counsel for the senior lenders as well as counsel for the debtors on it, and I have no doubt that there are sufficient difficult issues pertaining to confirmation of a plan that would be premised upon the structure in those documents to warrant a significant confirmation fight on issues that are not limited simply to legal determinations based on agreed facts, but, instead, issues based upon feasibility and projections pertaining to the reorganized debtors that would emerge under the committee's plan, which, at this point, I have no assurance would be the same type of reorganized debtors that would emerge under the debtors' plan.

No one has given me testimony on what that additional cost would be; however, again based on my own experience, primarily reviewing fee applications, I believe that the debtors would be in danger of having their remaining cash completely eroded by such a fight: that is, that the additional cost of terminating exclusivity and having a plan confirmation fight on not one but two plans could exceed five

million dollars. That clearly would trigger a default under the cash collateral order, and, more importantly, not be good for the debtors and their business and their creditors.

Obviously, someone would bear that cost. I can't imagine the debtors would go out of business over it; someone, the lenders or, if they were truly serious, the proposed investors in the committee's plan would find some way to pick up that cost, but it would interject a significant layer of uncertainty over the debtors' business and not be good for the business by any means.

Frankly, I believe that the parties are sufficiently well informed and now have the ability to negotiate that they didn't have prepetition, as a practical matter seeing the obvious alternative end results -- which are either an agreed plan or coming close to running out of cash before then -- and thus they should be able to negotiate a plan that is clearly confirmable or consensual in large measure. Frankly, I think that the money saved could go to bridge a negotiating gap, but there are many other ways one could imagine negotiating a plan that would have some chance of getting consensual support.

It seems to me, given the balance that Congress struck in Section 1121, and particularly where the debtors are proceeding, I believe, as Congress contemplated by promptly moving ahead with their plan, that they should be given the

chance to try to negotiate a plan that will have broader support.

I appreciate that one of the objections that would be raised to the current plan is that it is not being proposed and sought in good faith under Section 1129(a)(3) of the Bankruptcy Code. Clearly if those negotiations don't proceed, clearly if, instead, the unsecured creditors are left with only a death trap provision without those negotiations, a court might well be inclined to say that, one way or another, whether it's under the LaSalle case or Section 1129(a)(3), something is wrong at confirmation, given that exclusivity was left in place. I think the debtors, the senior lenders, Ivory Shipping, all should understand that risk as well as other risks that I've highlighted during the course of this hearing, and they should be prepared to negotiate in light of that.

At the same time, the unsecured creditors should certainly be prepared to understand the types of risks and concerns that have been articulated by the senior lenders, as well as the debtors, not just on valuation, but also on feasibility.

It seems to me that, and maybe this is just like saying I like apple pie and milk, the parties' time is better served without going down the path of two competing plans, but, instead, in appreciating that there'll be no high fives at the

end of this process unless they negotiate and see if they can reach an agreement that gets over the problems in the plan that have been identified by the committee.

So I will not, at this time, grant the motion to terminate. I have been very clear that at some point there may be a problem with this plan if, in fact, the debtors aren't able to show that there's been a fair opportunity to propose an alternative, under LaSalle. And whether that's under LaSalle or Section 1129(a)(3), that's just -- that's going to be an issue. So I hope that I won't ever have to ever get to that point. So I'll ask debtors' counsel, Mr. McDermott, if you could submit an order denying the motion for the reasons stated on the record.

Dated: White Plains, NY
September 13, 2013

/s/Robert D. Drain
United States Bankruptcy Judge